

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GARY SMITH,

Plaintiff,

v.

WACHOVIA MORTGAGE CORPORATION,
et al.,

Defendants.

3:12-cv-26-RCJ-VPC

ORDER

Currently before the Court is a motion to dismiss for failure to state a claim, to expunge the lis pendens on the property, and a request for sanctions (#5) filed by Defendant Quality Loan Service Corporation ("Quality"). For the following reasons, the Court grants Quality's motion to dismiss and expunge the lis pendens, but denies the request for sanctions.

BACKGROUND¹

On or about September 5, 2007, Plaintiff Gary Smith purchased real property located at 18241 Alderwood Court, Reno, Nevada (the "Property"). (Deed of Trust (#5-1) at 1, 3). To finance the purchase of the Property, Smith obtained a loan in the amount of \$206,910 from Wachovia Mortgage Corporation, which was secured by a deed of trust (the "Deed of Trust").

¹ Quality has attached copies of relevant publicly recorded documents in support of its motion. (See Exs. (#5-1 through #5-6)). The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 (*Id.* at 2). The Deed of Trust named Wachovia Mortgage as lender, TRSTE, Inc. as trustee,
2 and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee and beneficiary.
3 (*Id.* at 1-2).

4 On April 22, 2011, MERS assigned all beneficial interest in the Deed of Trust to Wells
5 Fargo Bank, N.A. (Assignment (#5-2)). Wells Fargo then executed a substitution of trustee
6 on August 5, 2011, substituting Quality as trustee over the Deed of Trust. (Substitution of
7 Trustee (#5-3)).

8 Smith defaulted on the loan secured by the Deed of Trust by failing to make the
9 payment due on January 1, 2011. (Notice of Default (#5-4)). Quality began the foreclosure
10 process by recording a notice of default on August 22, 2011. (*Id.*). Quality then recorded a
11 notice of trustee's sale on December 23, 2011. (Notice of Trustee's Sale (#5-5)).

12 Smith filed this complaint in Nevada state court on January 5, 2012 against Wachovia
13 Mortgage, TRSTE, Quality, Wells Fargo, Bosten Striegel, and Fannie Mae. (Compl. (#1-1) at
14 1). The complaint lists six causes of action, including (1) debt collection violations; (2)
15 violations of the Unfair and Deceptive Trade Practice Act (NRS § 598.0923); (3) violation of
16 the covenant of good faith and fair dealing; (4) violation of NRS § 107.080; (5) quiet title; and
17 (6) fraud in the inducement and through omission. (*Id.* at 14-34). Smith also filed a notice of
18 lis pendens on the Property the same day he filed his complaint. (Notice of Lis Pendens (#1-
19 1)).

20 This dispute was removed to federal court by Quality on January 17, 2012. (Pet. for
21 Removal (#1)). Quality then filed a motion to dismiss the complaint for failure to state a claim
22 on January 19, 2012. (Mot. to Dismiss (#5)). In the same motion, Quality also seeks to have
23 the lis pendens on the Property expunged and sanctions to be imposed on Smith's attorney,
24 Rick Lawton, claiming the action is frivolous and unsupported. (*Id.* at 14-15). A hearing was
25 held on these matters on April 23, 2012.

26 LEGAL STANDARD

27 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test
28 the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

1 “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled
 2 to offer evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th
 3 Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

4 To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a
 5 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
 6 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim
 7 is plausible on its face “when the plaintiff pleads factual content that allows the court to draw
 8 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
 9 *Iqbal*, 556 U.S. 662, 678 (2009). Although detailed factual allegations are not required, the
 10 factual allegations “must be enough to raise a right to relief above the speculative level.”
 11 *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be accepted as true and
 12 all reasonable inferences that may be drawn from the allegations must be construed in the
 13 light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.
 14 2003).

15 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 16 leave to amend. The court should freely give leave to amend when there is no “undue delay,
 17 bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing
 18 party by virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*,
 19 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only
 20 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.
 21 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

22 DISCUSSION

23 I. Motion to Dismiss

24 Quality has filed a motion to dismiss all six causes of action against it for failure to state
 25 a claim and further seeks to have the lis pendens on the Property expunged. (Mot. to Dismiss
 26 (#5) at 16).

27 In Smith’s first cause of action for debt collection violations under NRS § 649.370,
 28 Smith has failed to state a claim because none of the defendants are debt collectors as

1 required by the statute. NRS § 649.370 states that a violation of the federal Fair Debt
2 Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq., along with all regulations
3 adopted under this Act is a violation of Nevada law. For a defendant to be liable for a violation
4 of the FDCPA, the defendant must be classified as a "debt collector" within the meaning of the
5 Act. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, 2010
6 WL 4102943, at *3 (D. Nev. 2010). A "debt collector" is defined by the FDCPA as a person
7 "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or
8 asserted to be owed or due another." 15 U.S.C. § 1692a(6). Foreclosure pursuant to a deed
9 of trust does not constitute debt collection under the FDCPA. *Camacho-Villa v. Great W.*
10 *Home Loans*, 2011 WL 1103681, at *4 (D. Nev. 2011). Additionally, "the FDCPA's definition
11 of 'debt collector' does not 'include the consumer's creditors, a mortgage servicing company,
12 or any assignee of the debt, so long as the debt was not in default at the time it was assigned.'
13 " *Id.* (quoting *Croce v. Trinity Mortg. Assurance Corp.*, 2009 WL 3172119, at *2 (D. Nev.
14 2009)). As the defendants here are foreclosing on the Property pursuant to a deed of trust,
15 they do not qualify as "debt collectors" within the meaning of the FDCPA, and consequently
16 neither the FDCPA nor NRS § 649.370 apply.

17 The first cause of action additionally fails against Quality because it is a licensed foreign
18 debt collector. Smith contends that Quality violated NRS § 649.370 and the FDCPA by
19 sending collection notices without a license. (Compl. (#1-1) at 14). Quality however has
20 presented evidence that it is in fact licensed as a foreign debt collection agency. (License (#5-
21 6)). Because Quality does in fact have a license, the first cause of action lacks merit.

22 Smith's second cause of action alleging unfair and deceptive trade practices in violation
23 of NRS § 598.0923 is also dismissed. Under the statute, a person engages in a deceptive
24 trade practice when he or she knowingly conducts business without all required state, county
25 or city licenses. NEV. REV. STAT. § 598.0923(1). The statute however explicitly states that the
26 following activities do not constitute doing business in the State of Nevada: (1) maintaining,
27 defending or settling any proceeding; (2) creating or acquiring indebtedness, mortgages, and
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1 security interests in real or personal property; and (3) securing or collecting debts or enforcing
2 mortgages and security interests in property securing the debts. NEV. REV. STAT. 80.015(1)(a),
3 (g)-(h). Because the defendants in this mortgage case are not considered to have been doing
4 business in Nevada, NRS § 598.0923 does not apply. Furthermore, this claim fails against
5 Quality because, as stated above, Quality has the proper foreign debt collection licenses.
6 (License (#5-6)). Accordingly, this cause of action is dismissed without leave to amend.

7 The Court also dismisses Smith's third cause of action for violation of the covenant of
8 good faith and fair dealing. Nevada law holds that "[e]very contract imposes upon each party
9 a duty of good faith and fair dealing in its performance and its enforcement." *A.C. Shaw*
10 *Constr., Inc. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT (SECOND) OF
11 CONTRACTS § 205). To succeed on a cause of action for breach of the covenant of good faith
12 and fair dealing, a plaintiff must show: (1) the plaintiff and defendant were parties to an
13 agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3) the defendant
14 breached that duty by performing in a manner that was unfaithful to the purpose of the
15 contract; and (4) the plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d
16 335, 338 (Nev. 1995).

17 The defendants first allegedly violated the covenant of good faith and fair dealing by
18 luring Smith into the initial loans by wrongfully declaring he qualified for the loans. (Compl.
19 (#1-1) at 17-18). Yet to be actionable, the breach of the covenant must have occurred *after*
20 the formation of the contract, not *before*. *Crow v. Home Loan Ctr., Inc.*, 2011 WL 3585466,
21 at *3 (D. Nev. 2011). Smith also contends the defendants violated the covenant of good faith
22 and fair dealing by offering Plaintiff consideration for loan modifications, falsely telling him the
23 foreclosures would be postponed. (Compl. (#1-1) at 18). Yet he has provided no information
24 that confirms the existence of a loan modification agreement or contract between the parties.
25 See *Perry*, 900 P.2d at 338 (requiring the plaintiff to show the existence of a contract to state
26 a claim for breach of the covenant of good faith and fair dealing). Finally, Smith argues the
27 defendants violated the covenant of good faith and fair dealing by frustrating the legitimate
28 purposes of the mortgage contract. (Compl. (#1-1) at 18-19). Foreclosing upon a loan where

1 such foreclosure is permissible by law and the Deed of Trust does not deprive Smith of any
2 justifiable expectations as he consented to the arrangement.

3 Smith has also failed to state a claim under his fourth cause of action for violations of
4 NRS § 107.080 because the foreclosure was proper. Wells Fargo and Quality had both been
5 properly substituted as the beneficiary and trustee, respectively, prior to initiating the
6 foreclosure process. (Assignment (#5-2); Substitution of Trustee (#5-3)). Smith also received
7 all the notices required under NRS § 107.080 at the appropriate time. (Notice of Default (#5-
8 4); Notice of Sale (#5-5)). Because all relevant parties were properly assigned and
9 substituted, and because Smith was in default, the foreclosure was not defective. *See Gomez*
10 *v. Countrywide Bank, FSB*, 2009 WL 3617650, at *2 (D. Nev. 2009) (finding that as long as
11 the note is in default and the foreclosing trustee is either the original trustee or has been
12 substituted by the holder of the note or the holder's nominee, there is no defect in the
13 foreclosure).

14 The fifth cause of action for quiet title lacks merit because Smith is in default and has
15 not alleged he has paid the debt owed. A quiet title action may be brought by a party who
16 claims an adverse interest in the subject property. NEV. REV. STAT. § 40.010. Quiet title
17 actions are equitable in nature and it is generally required that a party that seeks equity must
18 do equity. *Transaero Land & Dev. Co. v. Land Title of Nevada, Inc.*, 842 P.2d 716, 718 (Nev.
19 1992). For the plaintiff to do equity, it is generally required that the plaintiff tender the
20 undisputed amount due on the note in order to challenge the validity of the foreclosure sale.
21 *Davila v. BAC Home Loans Servicing, LP*, 2011 WL 3159146, at *2 (D. Nev. 2011). Quieting
22 title to the Property would be inequitable here as Smith has failed to prove any of his other
23 claims in the complaint. Smith has also defaulted on the loan and has failed to allege he has
24 tendered or is willing to tender the amount owed on the debt.

25 Smith's sixth and final cause of action for fraud in the inducement and through omission
26 fails because he has not alleged any fraudulent statements or omissions concerning the terms
27 of the loan and because he has failed to satisfy the strict pleading requirements of Fed. R. Civ.
28 P. 9(b). Under Nevada law, a claim of fraud requires the plaintiff to establish each of the

1 following elements: (1) a false representation; (2) knowledge or belief that the representation
2 was false (or knowledge that the defendant's basis for making the representation was
3 insufficient); (3) intent to induce the plaintiff to consent to the contract's formation; (4)
4 justifiable reliance upon the misrepresentation; and (5) damage resulting from such reliance.
5 *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004).
6 Pursuant to Rule 9(b), a party alleging fraud "must state with particularity the circumstances
7 constituting fraud or mistake." To satisfy this standard, a plaintiff must plead "an account of
8 the 'time, place, and specific content of the false representations as well as the identities of
9 the parties to the misrepresentations.' " *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
10 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)).

11 Smith has not alleged any false statements or omissions that were material to the terms
12 of the loan. He only alleges that he was not made aware of the inner workings of the
13 mortgage industry, which ultimately had no effect upon the loan agreement. As Smith has not
14 alleged any false statements or omissions concerning the terms of the loan, he has failed to
15 state a claim for fraud. Additionally, Smith's fraud allegations lack the specificity required by
16 Rule 9(b) because he has failed to allege which of the defendants committed what alleged
17 fraud, and when and where these fraudulent actions took place. The Court therefore
18 dismisses Smith's sixth cause of action.

19 Accordingly, the Court grants Quality's motion to dismiss (#5) the complaint in its
20 entirety without leave to amend and orders the lis pendens on the Property expunged.
21 Moreover, the Court *sua sponte* dismisses all claims against the remaining defendants without
22 leave to amend because Smith has failed to state a claim against them.

23 **II. Request for Sanctions**

24 Quality also seeks sanctions against Smith's attorney, Rick Lawton, for filing this action
25 when there was absolutely no question that the foreclosure was statutorily proper. (Mot. to
26 Dismiss (#5) at 15). "A motion for sanctions must be made separately from any other motion
27 and must describe the specific conduct that allegedly violates Rule 11(b)." FED. R. CIV. P.
28 11(c)(2). Although Quality has described the conduct that it believes violates Rule 11(b), it has

1 not filed its request for sanctions in a separate motion as required by Rule 11(c)(2), but rather
2 combined the request for sanctions with its motion to dismiss. (Mot. to Dismiss (#5) at 14-15).
3 As Quality has failed to comply with the proper procedure for seeking sanctions, the request
4 for sanctions is denied.

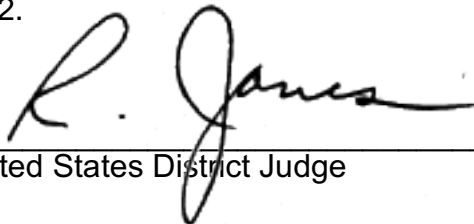
5 **CONCLUSION**

6 For the foregoing reasons, IT IS ORDERED that Quality's motion to dismiss and
7 expunge lis pendens (#5) is GRANTED and the complaint is hereby dismissed without leave
8 to amend.

9 IT IS FURTHER ORDERED that the Court *sua sponte* dismisses all claims against the
10 remaining defendants without leave to amend as Plaintiff has failed to adequately state a claim
11 against them.

12 IT IS FURTHER ORDERED that Quality's request for sanctions is DENIED.

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14 DATED: This 3rd day of August, 2012.

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17 United States District Judge
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